Section 9(1) under which the accused was convicted reads as follows:—

"No person shall import or export dutiable tobacco except under and in accordance with such regulations and restrictions as are prescribed."

It was argued that the meaning of this provision is that anyone may import or export unless prohibited by such restrictions and regulations as may be prescribed and that no regulations on the subject having been made, there can be no offence under Section 9(1). In this connection it was argued that owing to the juxtaposition of 'regulations and restrictions' the meaning must be that such regulations and restrictions must be prescribed by rules made in pursuance of Section 59(d) of the Ordinance and that the restrictions indicated are not such as can be discovered in the Ordinance itself.

I do not think that this point is material.

Section 9(1) is prohibitory and not permissive in form and in intention. The law *prima facie* makes the importation of tobacco an offence, and it is for the accused to prove that he falls within the exception, just as under the Penal Code the onus is on the accused to prove that his case falls under one of the exceptions which will reduce the crime of murder to one of culpable homicide not amounting to murder. As admittedly no rules have been made in pursuance of Section 59(d) it is clearly impossible for the accused to establish his innocence.

Then it was said that the charge ought to have been framed under Section 9(4) which reads as follows:—

"No person shall import or export dutiable tobacco by land, except by parcel post or railway or into or from a place appointed by the Superintendent by notification in the gazette."

But it is not suggested that the accused imported the tobacco by parcel post or by railway and it is again admitted that no place has been appointed by the Superintendent by notification in the gazette. As I feel satisfied that if the accused had been charged under Section 9(4) he must have been convicted, there has clearly been no failure of justice and Section 428 of the Criminal Procedure Code applies.

The appeal, therefore, fails and must be dismissed and the sentence confirmed. The effect of this ruling is that no tobacco can be imported by road from Johore to Malacca without committing an offence as no examination station has ever been established at the frontier as contemplated by the Ordinance. So much was admitted by the Monopolies Officer who gave evidence for the prosecution. The practice appears to be that if a man imports tobacco in this way and voluntarily pays the duty in Malacca he will not be prosecuted. In other words the Monopolies Department covers up its failure to provide examination stations as contemplated by the legislature by omitting to prosecute for offences which become inevitable as the result of such failure.

There is one other aspect of this case which is deserving of comment. The evidence of the prosecution was that the tobacco had been imported from Johore in car No. M. 864 and that dregs of tobacco and gunny bags were found in the car and that the car had been seized. If that were not enough the accused himself stated on oath that he had imported the tobacco in this very car. Thereupon the learned magistrate was under a statutory duty to forfeit the car, Section 52(1) of Ordinance No. 158 (Tobacco Duties) reading as follows:—

"All tobacco in respect of which any offence under this Ordinance has been or is being committed, together with any receptacle, package, cart, carriage or conveyance in which the same is found, may be seized by any revenue officer, and any tobacco, receptacle, package, cart, carriage, or conveyance so seized shall be forfeited."

The learned magistrate however, did nothing of this sort. His notes read "No order for forfeiture of car—no evidence that tobacco was found in it—produced by remnants."

Quite apart from the fact that the evidence was all the other way, the learned magistrate did not appear to realise that he had no discretion in the matter. As soon as the evidence proved that the car had been seized forfeiture should have followed automatically. It should be observed that it is entirely outside the province of judges or magistrates to mitigate the harshness of a law by arrogating to themselves a discretion of which the legislature has thought fit to deprive them.

Appeal dismissed.
Sentence confirmed.

Solicitors for the Appellant—*Allen & Gledhill.*

F. M. S.

[APPELLATE CIVIL JURISDICTION]

V. R. K. R. S. CHETTIAPPAH CHETTY **Appellant**

vs.

RAJA ABDUL RASHID IBNI ALMERHUM SULTAN IDRIS .. .. .. Respondent

[PERAK CIVIL APPEAL No. 9 of 1932]

Perak Order in Council, 1888—Meaning of the words 'sued for a debt'—Land Code, 1926, Section 149.

A chargee, in taking proceedings under Section 149 of the Land Code, does not 'sue for a debt,' and the provisions of Perak Order in Council, 1888, have no application whatsoever to such proceedings.

Decision of Gerahty, J., reversed.

APPLICATION before Gerahty, J.

E. Jones for the chargee.

Chargor absent and not represented.

GERAHTY, J.—This matter arises on an appeal to me against the decision of the Assistant Registrar given on 2nd July, 1932, in rejecting the admission of the affidavit and summons filed by V. R. K. R. S. Chettiappah Chetty of Kuala Kangsar under Section 149 of the Land Code, 1926, against Raja Abdul Rashid on the grounds that the said Raja Abdul Rashid is a member of the Perak Royal Family, and that he is therefore not liable to be sued for debt under an Order in Council of the 8th January, 1888.

The material words of the said Order in Council are as follows:—

> 'No member of the Royal Family of Perak (Waris Negri) is liable to be sued for debt in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident.'

The question is whether proceedings taken under Section 149 of the Land Code, 1926, are covered by the words 'sued for a debt' as contained in the Order in Council above cited.

Mr. Edgar Jones for the appellant argued before me that such proceedings are not in fact a suit for a debt and cites Section 40 of the Civil Procedure Code, 1918, which provides that every suit shall be instituted by presenting a plaint.

This contention would appear to be supported by the case of *Guthrie and Bunyon* v. *Fisk and Patteson*, (1824) 3 B. and C. 178; 107 E.R. 700. Bayley, J. in the course of his judgment expressed the view that 'The expression to sue, generally speaking, means to bring actions.'

I have followed, however, precedent in this Court and held that the words 'sued for a debt' as employed in the Order in Council should be given a more comprehensive meaning than they *prima facie* bear, and should be deemed to include the procedure provided by Section 149 of the Land Code for the exercise by a chargee of his remedy where default in payment has been made by the chargor.

The chargee appealed.

The appeal was heard on 20th October, 1932.

J. L. Woods for the appellant.

Respondent absent and not represented.

THORNE, AG. C.J.—This is an appeal against the refusal by the Registrar of this Court to grant a Chetty chargee permission to proceed to enforce his charge under the provisions of the Land Code.

In June last the appellant sought to issue a summons in chambers addressed to one Raja Abdul Rashid Ibni Almerhum Sultan Idris, calling upon him to show cause why certain land and houses should not be sold and the proceeds applied in satisfaction of the charge. The charge is dated 20th May, 1931. The summons in chambers was supported by an affidavit setting out a *prima facie* case to entitle the chargee to enforce his charge against the chargor.

When the matter came before the Registrar, he referred to an Order in Council dated the 29th February, 1888, which reads as follows:—

> 'No Member of the Royal Family of Perak (Waris Negri) is liable to be sued for debt in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident.'

and dismissed the application.

By section 149 of the Land Code, it is provided that, after establishing the default by the chargor in accordance with the provisions of the earlier sections of the Code, it shall be lawful for the chargee by summons to call the proprietor of the charged land to show cause why the land should not be sold by public auction under the direction of the Court.

It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the Court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.

Now, the wording of the Order in Council to which I have referred is 'No member of the Royal Family is liable to be sued for debt.' Apparently the Registrars of this Court in the past have all held that Order was sufficiently wide in its terms to comprise applications by chargees under the Land Code.

An appeal against the decision of the Registrar was preferred to the learned Judge who, rather as a matter of personal conviction, upheld the decision of the Registrar, because he thought that by so doing, he was acting in consonance with the established practice of this Court. I am not aware of the practice myself, but I should not have thought that a sufficient number of the members of the Royal Family of this State would have been defaulting chargors, so as to give rise to such an established practice.

I am of opinion that the notification has no application whatsoever to the case of the chargee's application under Section 149 of the Land Code. The applicant does not commence an action or suit and does not file a plaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt,' but he applies

for leave to exercise his rights as a chargee. The proceedings result not in a judgment or decree, but in the making or refusal of an order of sale. After the sale has taken place and the chargee has prepared his account, and he takes action to recover any deficiency shown thereby, different considerations will of course arise, but at the earlier stage the chargee does not sue on the agreement to repay the sum lent, but as I have said, applies for leave to sell the land the subject of the charge.

That being so, this notification has no application.

I would allow the appeal, reverse the order below, and send the matter back to the Registrar with an intimation that this Court is of the opinion that permission should be accorded to the chargee to pursue his remedies against the chargor. No order as to costs.

MUDIE, J.—I agree.

MCFALL, J.—I agree.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE ESTATE AND EFFECTS OF HENRY CHARLES TAYLOR, DECEASED.

[SELANGOR ORIGINATING SUMMONS No. 71 of 1932]

Benefit Society—Right of nominee of a deceased member to Death Allowance.

The nominee of a deceased member of a Benefit Society is entitled to the sum of money due to be paid out by the Society on the death of the member. This sum of money does not form part of the estate of the deceased and is not available for the payment of his debts.

Creditor in person.

Administratrix in person.

MUDIE, J.—This is an application by a creditor of the deceased that his debt should be paid out of monies in the hands of the administratrix which were paid to her by the Federated Malay States Benefit Society and the Mutual Provident Association, as nominee of the sums payable on the death of the deceased in respect of payments made by the deceased in his lifetime.

The estate is insolvent. The creditor is secured by a charge on certain lands of the deceased. But the value of the security is less than the debt.

Benefit Societies are governed in England by the Friendly Societies Act, 1896. Here there is no legislation on the subject. The contract entered into between the deceased and the society is that in consideration of payments made by the deceased to the society in his lifetime, the society will pay certain monies to the nominee of the deceased on his death. These monies are therefore the property of the nominee, and do not form part of the estate of the deceased. The transaction is of the nature of a gift, though it may be revocable.

It seems to me that unless and until it is set aside as a fraud on the creditors, there is a valid transfer of property. These monies therefore are not available for payment of the deceased's debts.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION]

LOKE KUI THONG .. .. .. **Appellant**

vs.

PUBLIC PROSECUTOR . .. **Respondent**

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 40 of 1932]

Public Nuisance—Criminal Procedure Code, 1926, Section 89—Powers of Magistrate.

Under Section 89 of the Criminal Procedure Code, 1926, the only power of a First Class Magistrate, when he considers that any trade is injurious to health or physical comfort, is to require the person carrying on the trade to suppress or remove that trade or occupation.

In the case of a dealer in gramophones, a First Class Magistrate has no power to make an order against him prohibiting him from making a noise by means of loud speakers and gramophones, in the course of his trade in selling such instruments.

The Hon. Mr. S. Veerasamy for the Appellant.

R. C. Cussen, Deputy Legal Adviser, for the Respondent.

THORNE, AG. C.J.—The appellant was charged before the Court of the Magistrate, Kuala Lumpur, with the offence of having played a gramophone between the 1st and 8th days of June of this year, in disobedience to an order of the Magistrate. He was convicted under section 188 of the Penal Code and fined $15.75. Against that conviction and sentence he has preferred this appeal.

The order, the terms of which are alleged to have been broken, is not set out in the record in the present appeal, but there appears on the record a notice which bears date 7th day of July, 1931, addressed to the appellant, which informs him that an order absolute has been made against him prohibiting him thenceforth from making a noise by means of loud speakers or gramophones, etc.

Under section 89 of the Criminal Procedure Code, whenever a Magistrate of the First Class considers that any trade, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed or prohibited, he may then make a conditional order requiring the person carrying on such